



DEPARTMENT OF THE ARMY  
U.S. Army Corps of Engineers  
WASHINGTON, D.C. 20314-1000

REPLY TO  
ATTENTION OF:

29 OCT 1997

CEMP-EC (415)


MEMORANDUM FOR COMMANDERS, MAJOR SUBORDINATE COMMANDS

SUBJECT: Indefinite Delivery Construction Contracts

1. The purpose of this memorandum is to provide information and guidance on the use of indefinite delivery contracts for Army installation support construction projects. (Encl 1)
2. As a key element in the revitalized initiative to provide support to our installation customers many of our commands are revolutionizing effectiveness through expanded use of innovative contracting methods. One method that has strong potential to provide flexibility, save time, and reduce administrative burden is the use of indefinite delivery contracts for operations and maintenance work.
3. The enclosed Construction Bulletin (Encl 2) was coordinated with the following Headquarters U.S. Army Corps of Engineers offices: Office of the Principal Assistant Responsible for Contracting, Office of the Chief Counsel, and Office of Small and Disadvantaged Business Utilization. It provides an outline of this contract method to include intended uses and some potential pitfalls. We encourage prudent use of this method and solicit your feedback and lessons learned on the results of its execution. We intend to develop and field formal training on this subject in the near future.

FOR THE COMMANDER:

2 Encls

  
MILTON HUNTER  
Major General, USA  
Director of Military Programs

CF:

Commanders, All Districts

U.S. Army Engineer Division, Great Lakes and Ohio River, Great Lakes Region  
U.S. Army Engineer Division, Great Lakes and Ohio River, Ohio River Region  
U.S. Army Engineer Division, Northwestern, Columbia River Region  
U.S. Army Engineer Division, Northwestern, Missouri River Region



US Army Corps  
of Engineers

# Construction Bulletin

No. 97-13 Issuing Office: CEMP-EC Issue Date: 10/30/97 Exp. Date: 31 DEC 1999

## CEMP-E

**Subject:** Indefinite Delivery Construction Contracts

**Applicability:** GUIDANCE

### 1. REFERENCES:

- a. Federal Acquisition Regulation (FAR)
- b. Army FAR Supplement (AFARS)
- c. Engineer FAR Supplement (EFARS)
- d. AR 420-10, Management of Installation Directorates of Public Work
- e. Deputy Secretary of Defense Memorandum, dated 28 October, 1996, Subject: Consolidation of Contract Requirements (Enclosure 1)
- f. CERM-F Memorandum, dated 14 July 1995, Subject: Bona Fide Need (Enclosure 2)

2. **PURPOSE.** To provide information and guidance on use of indefinite delivery construction contracts for installation support. (Note: See AFARS, Part 17.90 for Army policy on Job Order Contracting).

### 3. DEFINITIONS.

a. **Indefinite-Delivery Contract.** One of the five main contract types provided for by FAR Part 16. The other types are: (1) Fixed-Price, (2) Cost-Reimbursement, (3) Incentive, and (4) Time-And-Materials, Labor-Hour, and Letter. There are three types of indefinite-delivery contracts: Definite-quantity contracts, requirements contracts, and indefinite quantity contracts.

b. **Construction.** For the purposes and in the context of this guidance construction includes the acquisition of real property maintenance and repair and minor construction in accordance with the definitions in AR 420-10.

c. **Architect-Engineer Services.** FAR Part 36.601-4 provides a detailed definition of these services. FAR Part 36.601-3© covers contract statements of work which include both architect-engineer services and other services and requires the contracting officer to follow procedures governed by the dominant or substantial nature of the work in the contract scope.

d. **Job Order Contract (JOC).** A type of indefinite-delivery, indefinite-quantity contract which is awarded on the basis of full and open competition and effective competition and is used to acquire real property maintenance and repair or minor construction at installation level (post, camp, or station). The JOC includes a comprehensive collection of detailed repair, maintenance, and minor construction task descriptions or specifications, units of measure and pre-established unit prices for each of these discrete tasks. Each project or job ordered under a JOC is normally comprised of a number of predescribed and prepriced tasks. See AFARS Part 17.90.

e. **Indefinite-Delivery Construction Contract.** An indefinite-delivery, indefinite-quantity type contract (3.a.) for construction services (3.b.) awarded on the basis of established labor and overhead rates. Provides for an indefinite quantity, within stated limits, of services to be furnished during a fixed period with deliveries or performance to be scheduled by placing task orders with the contractor. Differs from JOC above because only labor and overhead rates are prepriced. Material and equipment costs and profit are negotiated for each individual task order. This type of contract is useful when the prepricing features under JOC are not possible because the nature of the work is less defined at the time of award.

f. **Task Order.** An order for the performance of services under an indefinite-delivery contract.

g. **Delivery Order.** An order for the delivery of supplies under an indefinite-delivery contract.

4. **ACQUISITION PLANNING.** Acquisition planning requirements are applicable to indefinite-delivery contracts and programs that are installation wide or programs that extend beyond the geographical boundary of the MSC. In accordance with the requirements of EFARS Part 7, a formal acquisition plan is required for any indefinite-delivery contract (or for any program involving multiple indefinite-delivery contracts) estimated at \$15 million or more for all years, including options, or \$5 million or more for any one year for base or installation support (including JOC). Plans are to be submitted to HQUSACE (ATTN: CEPR) for approval.

5. **MULTIPLE AWARDS.** More than one indefinite-delivery construction contract may be awarded for the same scope of work (e.g., single installation or area of responsibility) in accordance with provisions of FAR Part 16.504. This Part also provides exceptions for not using multiple awards. Minimum guarantees for each multiple award contract must be established in accordance with EFARS Part 16.504. The decision to use multiple awards must be made during the acquisition planning with customers and the project team. Potential advantages of multiple awards include flexibility in meeting requirements, additional performance incentive for the contractor(s) and leverage for the government in dealing with performance issues. Potential disadvantages include additional administrative costs, redundant mobilization and site superintendence costs, difficulty in workload projection and scheduling by multiple contractors, and the effort needed to develop and implement a sound management decision process for ordering work. (Note: Ordering Officers are not allowed to "auction" tasks to multiple award contractors!) Ordering procedures are covered by EFARS Part 16.505.

6. **SMALL BUSINESS.** The use of indefinite-delivery construction contracts can have the appearance and effect of "bundling" or packaging multiple requirements under one large contract to effectively shut out small business contractors. To avoid adverse impact on small business, large IDC contracts are generally required to contain significant and substantial subcontracting opportunities or preferences. These must be adequately addressed in the appropriate project/program management or acquisition plan. Commands planning to use this type of contract must assure full coordination with the appropriate Small Business Administration office and document agreement using the DD Form 2579, Small Business Coordination Record. In accordance with Department of Defense (DOD) policy (reference i.e.), when planning to consolidate contracts or requirements that might result in preclusion of small business the contracting officer must conduct an analysis to determine what significant benefits will accrue.

7. **ORDERING OFFICER APPOINTMENTS.** DOD and Army policy restricts ordering officers in awarding delivery and task orders. Ordering officers may only order from a "menu" of prepriced contract items. In some instances limited negotiation is allowed for items not contained in the basic contract that are below the simplified purchase threshold (\$2500). JOC is an example of a prepriced contract with prepricing of orders.

8. **BONA FIDE NEED RULE.** This rule requires that an appropriation may only be used to meet a legitimate need that arises or exists in the fiscal year of that appropriation. It focuses not on the legitimacy of the requirement (there must however, be a legitimate requirement), but upon the proper year funds to meet that requirement. Special attention is required when executing task orders near the end of the fiscal year to insure that this rule is not violated for the sake of obligating expiring funds. The checklist provided with reference 1.f. memorandum along with policy in DFAS-IN Regulation 37-1, should be used by those planning and executing indefinite delivery construction contracts. Early coordination and planning with customers to identify requirements, request proposals, and negotiate task orders subject to availability of funds (SAF) can mitigate the risk of

violating this rule during year end funding surges. Prudent prepositioning of SAF task orders should be an integral part of the contract execution strategy for indefinite delivery construction contracts. Policy and procedures for issuing solicitations SAF are covered by AFARS 1.602(a)(ii).

9. **COMBINATION TASK ORDERS.** Task orders for indefinite-delivery construction contracts may include both services and construction in the same order and both Davis-Bacon Act and Service Contract Act wage rates may be appropriate. Task orders may not be awarded solely for architect-engineer services (3.c.). This violates the Brooks Act and provisions of FAR Part 36.6. However, task orders may include both construction and incidental A-E services. Although similar to "design-build" the "design-build" terminology is only appropriate to contracts executed under provisions of 10 USC 2862 or 10 USC 2305a and 41 USC 253m as implemented by FAR Part 36.3.

Fixed-price task orders should be awarded whenever possible. Time and material (T&M) task orders and combination T&M and fixed-priced task orders are permitted but prudent use is essential. Task orders with T&M features may be used only when it is not possible at the time of placing the order to accurately estimate the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. A T&M task order provides no positive profit incentive to the contractor for cost control or labor efficiency and should be used only when absolutely necessary.

10. **TRAINING.** Commanders are responsible to assure that all members of the acquisition team understand the rules, regulations and procedures governing the planning and execution of an indefinite delivery construction contract. Commands should develop operating procedures tailored to their particular organization and customers.

11. **INFORMATION SOURCES AND RESOURCES.** Various USACE commands are presently using, or are planning to use, this type of contract. Following is a partial listing.

Kansas City District, Small Project Indefinite Delivery Type (SPIDT) Contract

Mobile District, Indefinite Delivery/Indefinite Quantity Contract for Installation Support

Fort Worth District, IDIQ Contracts with T&M Capability

Seattle District, Small Projects Office Initiatives

Huntsville Engineering and Support Center, Simplified Facility Support Process

CEMP-EC

SUBJECT: Indefinite Delivery Construction Contracts

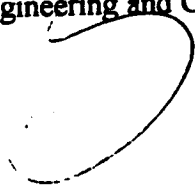
12. This CB was coordinated with the following HQUSACE organizations: Office of the Principal Assistant Responsible for Contracting (CEPR-ZA); Office of the Chief Counsel (CECC-C); and Office of Small and Disadvantaged Business Utilization (CEDB).

Encl



KISUK CHEUNG, P.E.

Chief, Engineering and Construction Division





DEPUTY SECRETARY OF DEFENSE

1010 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1010



28 OCT 1996

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS  
DIRECTORS OF DEFENSE AGENCIES

SUBJECT: Consolidation of Contract Requirements

The Department of Defense (DoD) recognizes the critical role small, small disadvantaged, and women-owned small businesses play in DoD's ability to accomplish its mission. Thus, DoD is committed to fostering the use of the small business community in every aspect of its vendor base.

When we plan for the consolidation of several contracts or requirements into a single larger contract, we must consider the impact on small, small disadvantaged, and women-owned small businesses. I would like to emphasize the policy considerations that must be taken into account when contracts or requirements of a kind suitable for performance by small business are proposed for consolidation:

1. Requirements shall be packaged so as not to preclude performance by small, small disadvantaged, and women-owned small business concerns as prime contractors unless the consolidation will result in significant benefits in terms of reduced life cycle costs, improved services, or both. Any such determination shall be supported by market research analysis. The proposed consolidated procurement must be reviewed by the Small Business Administration procurement center representative in accordance with the Federal Acquisition Regulation (FAR) 19.202-1(e) if it is not set aside for small business. Any disagreements between the contracting officer and the procurement center representative should be resolved pursuant to FAR 19.505. Savings solely in the Department's cost of awarding or administering contracts is not sufficient basis for consolidation.

2. Solicitations for goods and services that would have previously been set aside for small or small disadvantaged businesses shall be reviewed for set aside under the order of precedence requiring consideration of award under section 8(a), or set aside under section 15 of the Small Business Act, prior to being included in a consolidated requirement.

3. Prior to contracting for a new requirement or a follow-on to an existing requirement, particularly for professional and technical services, the contracting officer shall conduct an analysis to determine if consolidation provides significant benefits. Prior to the exercise of an option, the contracting officer shall conduct such an analysis if the analysis was not conducted at the time of initial award. For each circumstance, if the analysis indicates consolidation will not provide significant benefits, the contracting officer shall break out tasks for competition. The awards shall be consistent with the order of precedence in the Defense Federal Acquisition Regulation Supplement (DFARS).

4. If it has been determined that consolidation of tasks will result in significant benefits, small, small disadvantaged, and women-owned small business firms shall be afforded the maximum opportunity to participate as direct awardees (particularly when multiple awards are anticipated) of portions of the proposed consolidated requirement. When establishing subcontract goals for the consolidated contract, the contracting officer shall consider the proportion, type, and level of sophistication of work previously awarded to small, small disadvantaged, and women-owned small business firms. The extent of small, small disadvantaged, and women-owned small business participation in contract performance shall be addressed during source selection, consistent with DFARS 215.605. The contracting officer shall consider using the incentive and award fee provisions in DFARS 219.708 to maximize both the magnitude and level of sophistication of work subcontracted to small, small disadvantaged, and women-owned small businesses.

5. This policy statement supersedes the policy statement signed by the Deputy Secretary of Defense, dated 1 June 1982, subject, "Consolidation and Small Business."

A handwritten signature in black ink, appearing to be "J. A. Fule", is written over a rectangular stamp that has been partially crossed out with a large 'X'.





DEPARTMENT OF THE ARMY  
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REPLY TO  
ATTENTION OF:

14 JUL 1985

CERM-F

MEMORANDUM FOR Commanders/Directors, MSCs, Districts, Labs and  
separate FOAs

SUBJECT: Bona Fide Need

1. Recent audits and investigations with regard to procurement actions within this Command have revealed the need for better understanding of 31 United States Code, Section 1502(a), which formulates the basis for what is commonly known as the "Bona Fide Need rule".

2. The law reads:

"The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law."

3. In some situations, expiring funds were accepted on reimbursable orders during, at or near the end of a fiscal year, and work not started until the new fiscal year had begun. In other situations, Federal Information Processing (FIP) personal services (severability issue) contracts were executed that crossed into an expired year. Still other recent cases involved procurement of equipment/supplies within a fiscal year which were clearly not needed until an ensuing fiscal year, and in which it could not be demonstrated that a long administrative lead time was required in order to obtain the item(s). For the purpose of the Bona Fide Need rule, these are prohibited practices.

4. Each Commander/Director should understand the Bona Fide Need rule. More importantly, they must ensure that those individuals to whom they have entrusted fund acceptance and/or fund certification responsibilities fully understand the Bona Fide Need rule.

5. Enclosure 1 is a checklist that was originally disseminated to all Corps activities back in 1986. It was annexed to the Army Audit Agency's 22 August 1986 Advisory Report on Bona Fide Need Rule, Report Number: HQ 86-A9. In addition, we have developed a checklist (encl 2) that addresses reimbursable funding/orders.

CERM-F

SUBJECT: Bona Fide Need

Utilization of these checklists will give greater understanding of the legal requirement and help to avoid violations of the Anti-Deficiency Act.

6. Point of Contact is Mr. Tom McQuillen, CERM-F, Commercial (202)761-1940, DSN 763-1940.

FOR THE COMMANDER:

2 Encls



JOHN F. WALLACE

Director of Resource Management

CHECKLIST FOR REVIEWING APPLICATION OF  
THE BONA FIDE NEED RULE 1/

	<u>Yes</u>	<u>No</u>
1. Do responsible personnel, including those in activities that establish requirements, order or contract for supplies and services, and certify fund availability, know of and understand the bona fide need rule?	—	—
2. Are responsible personnel aware of the guidance available for interpreting the bona fide need rule?	—	—
3. Do these personnel have job performance standards which require them to comply with the bona fide need rule?	—	—
4. Is all guidance available for use?	—	—
5. Are responsible personnel aware that the majority of bona fide need rule violations occur at fiscal yearend?	—	—
6. Are responsible personnel aware that violations of the bona fide need rule could result in funding violations, as described in AR 37-20?	—	—
7. Are orders and/or acquisitions of supplies and services reviewed by management personnel to ensure that they represent bona fide needs?	—	—
8. Are requirements for yearend acquisitions identified by advance acquisition planning, or are they based on an emergency need?	—	—
9. Are acquisitions of supplies at yearend made for quantities contained in the original acquisition request, or are they being increased without adequate justification?	—	—
10. Are supplies bought at yearend needed to fill authorized stockage levels, to replace stocks used, or to satisfy production/fabrication leadtimes?	—	—
11. Are contracts for services that are severable (that is, not a single undertaking) separated into requirements for each fiscal year?	—	—
12. Are the proper fiscal year's funds obligated for orders and/or acquisitions of supplies and services?	—	—

1/ These checklist questions are intended to be a starting point for reviews by commanders, activity chiefs, and their staffs of the application of the bona fide need rule. The checklist is not intended to be all inclusive. Limited analysis of operations is needed to obtain "yes" or "no" answers to each question. If one or more questions result in a "no" answer, the review should be expanded to do detail tests of operations to determine whether violations of the bona fide need rule have occurred.

Encl 1

**CORPS OF ENGINEERS ADDENDUM TO  
CHECKLIST FOR REVIEWING APPLICATION OF THE BONA FIDE NEED RULE**

- |   | <u>Yes</u> | <u>No</u> |
|---|------------|-----------|
| 1. When receiving reimbursable orders citing funds that will expire at the end of the current fiscal year (and in particular at fiscal year end), is a thorough and competent review performed to ensure that the funds can be legally obligated before expiration? | —          | —         |
| 2. Does the above review include an estimate of the administrative lead time that will be necessary to procure items through contract, and whether it therefore might be appropriate to use funds that will be appropriated in a future year?                       | —          | —         |
| 3. When posting obligations at year end, is care exercised to ensure that expiring customer funds are properly obligated and excess funds returned to the customer so that they might use them for a bona fide need they may have?                                  | —          | —         |
| 4. When excess customer funds are being returned at fiscal year end, is the customer being apprised of funding needs for the next fiscal year?  | —          | —         |

Encl 2